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Nos. 86-1717 and 86-1718

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In the Supreme Court of the United States

OCTOBER TERM, 1987

KALIMA JENKINS, ET AL., PETITIONERS

v.

THE STATE OF MISSOURI, ET AL.

KANSAS CITY, MISSOURI SCHOOL DISTRICT, ET AL., PETITIONERS

v.

THE STATE OF MISSOURI, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners contend that the court of appeals misinterpreted *Milliken* v. *Bradley,* 418 U.S. 717 (1974), when it affirmed the district court's denial of interdistrict relief in this school desegregation case. As the questions presented in the petitions are directed primarily at parties other than the federal respondents, this memorandum will explain first why there is no issue involving the federal respondents that warrants this Court's review and, second, why the questions on which petitioners seek certiorari are not properly presented on the record in this case.

1. a. In its early stages, this case involved a broad-based challenge to alleged racial segregation in the public

schools in the Kansas City, Missouri School District (KCMSD), and, more generally, in the Kansas City metropolitan area. Claims of interdistrict and intradistrict violations were asserted against the KCMSD, suburban school districts (SSDs), the State of Missouri, and a host of local, state and federal agencies and officials.[1] Following a lengthy presentation of evidence by the plaintiff (64 trial days, more than 140 witnesses, 2,100 exhibits, and 10,000 designated pages of depositions (see Pet. App. 12a)), the district court found no discrimination on the part of the SSDs and no lingering effects in those districts of prior discriminatory actions, and it therefore rejected petitioners' claims for interdistrict relief.[2] Following the presentation of further evidence, the court found that

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[1] The complaints named as defendants the United States Departments of Housing and Urban Development (HUD), Health, Education and Welfare (HEW), and Transportation (DOT), and the Secretary of HUD. DOT was dismissed by stipulation before trial. HEW was dismissed by the district court during the trial. Neither DOT nor HEW participated in proceedings in the court of appeals. Of the federal parties originally involved in this case, only HUD and the Secretary of HUD participated in the full trial and in the proceedings in the court of appeals. The claims against HUD and the Secretary were dismissed following trial, that dismissal was affirmed by the court of appeals, and HUD and the Secretary (hereinafter referred to collectively as HUD) are thus the only federal respondents in this Court.

[2] The district court stated that there had been no racially-motivated manipulation of district boundaries ("[l]ack of proof of discriminatory intent in the establishment or changing of any school district boundary lines" (Pet. App. 287a, 294a)); that it was unpersuaded "that any vestiges or significant effects of the pre-1954 dual school system remain in any of the SSDs" (*id.* at 315a); "that each of the defendant suburban school districts disestablished its pre-1954 school system with deliberate speed and that all vestiges of that system have long since ceased to exist" (*id.* at 316a); that neither the State's pre-1948 enforcement of racially restrictive covenants nor any other housing-related action had a significant current interdistrict effect (*id.* at 354a-369a).

racial segregation continued to exist within the district (KCMSD) in which the individual petitioners attend school and accordingly ordered substantial intradistrict relief against that district and the State of Missouri.[3] The district court dismissed all claims against HUD.

The court made several findings that specifically negate any liability on the part of HUD for segregation in the public schools within the KCMSD district. The court found: (1) "[i]f [the Federal Housing Authority's] appraisal practices prior to 1950 [which, it was claimed, considered the impact of racially restrictive covenants on market prices] had any effect on present racial housing patterns, it would, at most, be *de minim[i]s*" (Pet. App. 570a); (2) HUD "acted in a reasonable and responsive manner" in working out cooperation agreements with the Kansas City Land Clearance for Redevelopment Authority and the City of Kansas City, Missouri, to stop discrimination, permit HUD to monitor housing referrals, and increase referrals of minorities to housing locations outside the inner city (*id.* at 573a); (3) "the location of the public housing was in accordance with the congressional acts and * * * HUD's monitoring of the program was neither arbitrary nor capricious and * * * the compliance agreement entered into between [the Housing Authority of Kansas City] and HUD was reasonable" (*id.* at 578a); (4) "HUD followed a balanced housing policy and attempted to insure that assisted housing located in the inner city area was balanced by assisted housing projects in the suburban areas (*ibid.*); and (5) "[t]here was no evidence in the case that the practices of HUD in site selection and approval

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[3] The court's conclusion that intradistrict segregation exists within the KCMSD was based on its findings that the State and the KCMSD had maintained a dual system within that school district prior to 1954, that "vestiges of the State's dual school system still linger[] in the KCMSD" (Pet. App. 605a), and that the State and the KCMSD had not fulfilled their "obligation to disestablish that system" (*id.* at 604a).

for federally subsidized multi-family housing had a substantial effect upon the racial makeup of schools within the KCMSD" (*id.* at 580a). The district court therefore held that HUD had no liability (*id.* at 616a).

b. An evenly divided court of appeals, sitting en banc, affirmed the portion of the district court's judgment that dismissed all claims against HUD, noting that the petitioners did not "assert that the district court's underlying factual findings are clearly erroneous" (Pet. App. 111a).[4]

The court of appeals found that petitioners had presented no basis for concluding that the district court had erred as a matter of law in its judgment in favor of HUD (Pet. App. 114a), and accordingly, held that HUD had no liability. The court of appeals also affirmed the district court's denial of interdistrict relief as to all defendants and affirmed, as modified, the award of intradistrict relief against the KCMSD and the State of Missouri.

2. Neither petition raises a question challenging the findings and holdings of both lower courts that HUD has no liability in this case. Although the petition in No. 86-1717 makes several references to HUD,[5] it does not

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[4] In a separate opinion, Judge Arnold dissented only "from those portions of the lead opinion concerning suburban school district (SSD) participation in a remedy" (Pet. App. 141a); "[i]n all other respects," Judge Arnold "concur[red] in the judgment" (*ibid.*). That statement of his position would have made Judge Arnold an additional vote to affirm HUD's dismissal, resulting in a 5-3 vote in favor of affirmance of the dismissal of the claims against HUD. However, because Judge Arnold's opinion also expressed "concerns" over the trial court's analysis of the claims against HUD (*id.* at 163a n.10), the plurality opinion deemed the court to be evenly divided on the disposition of the claims against HUD (see *id.* at 8a-9a).

[5] Only the petitioners in No. 86-1717 raised in the court of appeals the district court's dismissal of HUD; petitioners in No. 85-1718 did not challenge below the dismissal of HUD and they do not do so in this Court.

With respect to the petition in No. 86-1717, it is clear that the first question presented—whether interdistrict relief was properly denied

challenge the factual findings, in which both courts below concurred, that support the dismissal of all claims against HUD. Nor, for that matter, does the petition in No. 86-1717 contend that HUD caused any illegal segregation that may presently exist in the local public schools.[6]

"on the ground that the State and not the surrounding school districts caused * * * segregation" (Pet. ii)—does not relate to HUD. The second question presented—whether interdistrict relief is warranted against "Missouri and the other defendants" that "intentionally segregated black and white children into separate school districts prior to 1954 and took no steps thereafter to remedy that interdistrict segregation" where there are alleged to be "continuing areawide effects of the defendants' post-1954 segregative conduct" (*id.* at ii-iii)—does not on its face appear to include HUD, which had no part in the pre-1954 intentional segregation in Missouri schools.

If petitioners did intend to embrace HUD within the scope of the phrase "other defendants," the second question still would not present an issue involving HUD that warrants this Court's review. As we discuss in the next, petitioners did not challenge in the court of appeals, and they do not challenge in this Court, the findings of fact that exonerate HUD; nor do petitioners challenge the judgments of both lower courts that hold HUD not to be liable.

[6] Petitioners' inability to establish in the district court that HUD's actions contributed to segregation in the schools in the Kansas City metropolitan area is fatal to any claim against HUD. Even petitioners' expert testified (Tr. 14,891-14,893) that by 1954 the KCMSD schools were bound on a course to become heavily black no matter what desegregation actions were taken. Moreover, HUD played no role in policies that were identified by the witnesses as contributing significantly to segregation of the Kansas City schools: KCMSD zone boundary changes that had the effect of perpetuating the prior system of de jure segregated schools (Tr. 6798-6799, 6869-6870); KCMSD's liberal transfer policy that permitted students to attend schools of their choice outside the attendance zone in which they lived (Tr. 3024-3028, 6604, 6973; 24 C.A. App. 7368); KCMSD's policy of opening newly constructed or annexed schools in the late 1950's and 1960's as either all-black or all-white schools (7 C.A. App. 1992-2020); curriculum changes at Paseo High School (Tr. 6654, 15,155); the urban

In addition, petitioners do not challenge the district court's finding, affirmed by the court of appeals, that "[t]here was no evidence in the case that the practices of HUD in site selection and approval for federallly subsidized multi-family housing had a substantial effect upon the racial makeup of schools within the KCMSD" (Pet. App. 580a). See *Goodman* v. *Lukens Steel Co.*, No 85-1626 (June 19, 1987), slip op. 8; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). At all events, the key factual findings in this case, on which both lower courts agreed, are well supported by the record. The HUD-assisted housing program at issue here did not even begin until 1969 and the overwhelming majority of HUD-assisted multifamily housing units within KCMSD were developed subsequent to 1970—after the KCMSD had already become a majority black school district (7 C.A. App. 2229). The small number of families using the mortgage assistance offered as part of that program belies the notion that HUD had a significant impact on the racial composition of the schools (Tr. 12,371, 12,062-12,063).[7]

3. As the dismissal of HUD from this case is a wholly factbound matter that petitioners do not challenge, HUD has no continuing role in this case. Indeed, HUD did not take a position in the lower courts on the questions that petitioners raise here, which focus on the court of appeals' reliance on *Milliken* v. *Bradley* in affirming the denial of interdistrict relief.[8] Although HUD's participa-

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riots of April 1968 (Tr. 6851, 6942); and increases in neighborhood crime (Tr. 6804, 6851, 6949, 12,119).

[7] Similarly, the total number of urban renewal relocations by the Land Clearance for Redevelopment Authority represented less than .2% of the overall turnovers in the Kansas City area between 1950 and 1980 (Tr. 20,368-20,369).

[8] The district court dismissed the claim against HUD in an order (Pet. App. 518a-617a) that was entirely separate from the opinion in which the court dealt with questions of interdistrict remedies against

tion in the case is unrelated to the issues raised in the petitions, those issues are of interest to the United States and we will therefore comment briefly on whether further review is warranted with respect to the lower courts' denial of interdistrict relief against other respondents in this case.

a. In our view, the record in this case presents no occasion for this Court to consider whether the court of appeals misconstrued *Milliken* v. *Bradley*. As a threshold matter, petitioners' effort to press their claim for interdistrict relief against the other respondents suffers from problems similar to those that beset petitioners' claims against HUD. In a case in which the lower courts' unchallenged findings show no interdistrict violation and no present significant interdistrict effects flowing from any intradistrict violation (see Pet. App. 65a-66a), the prospect of an interdistrict remedy simply does not arise.

Petitioners argue that *Milliken* v. *Bradley* does not require as a predicate to the imposition of an interdistrict desegregation remedy against a given school district that that school district be found to have committed an independent constitutional violation. Building on this premise, petitioners contend that they are entitled to interdistrict relief against the suburban school districts based on constitutional violations by the State. But even if all of petitioners' legal contentions were accepted, it would not change the judgment in this case. The court of appeals concluded, based on the district court's unchallenged factual findings, that the SSDs had not themselves committed constitutional violations (Pet. App. 63a); that "all SSDs met their obligation to operate a unitary school system within a maximum of four years after *Brown* [v. *Board of Education*, 347 U.S. 483 (1954)], most of them doing so within one year" (Pet. App. 47a-48a); and that the intra-

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the SSDs (*id.* at 274a-517a); it is the latter opinion that is targeted by the petitions for a writ of certiorari.

district violation by the State had no present effect in the SSDs, a conclusion based on "the district court's findings that within at most four years after *Brown I*, any vestiges of the dual school systems that may have existed in the SSDs [prior to 1954] had been eliminated" (*id.* at 54a; see *id.* at 66a).[9]

The court of appeals identified the feature of petitioners' theory that remains its fatal weakness in this Court, *viz.*, that "[t]he arguments of [petitioners in No. 86-1717] run contrary to the facts found by the district court" (Pet. App. 57a (footnote omitted)). Having concluded that the district court's findings were not clearly erroneous, the plurality of the court of appeals, relying on *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-575 (1985), properly refused to "substitute its judgment for that of the district court" (Pet. App. 58a). See *City of Pleasant Grove* v. *United States*, No. 85-1244 (Jan. 21, 1987), slip op. 9-10; *Maine* v. *Taylor*, No. 85-62 (June 23, 1986), slip op. 13-15. Given the factual record on which the case comes before this Court, it is plain that the interdistrict remedial questions posed by petitioners would not be reached in disposing of this case. It is similarly clear that *Milliken* v. *Bradley* is controlling.

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[9] This latter point was reiterated in the district court's order of May 11, 1987, ruling on motions for awards of attorney's fees. In that order (at 13), the district court stated that "[i]t is undisputed that the [petitioners] failed in their attempt to prove an interdistrict liability against the State of Missouri."

Even though petitioners "presented no evidence that any of the SSDs acted to cause segregation" (Pet. App. 352a-353a), the district court considered and rejected (*id.* at 303a, 352a-371a) each of petitioners' theories for including the SSDs in an interdistrict remedy based on the "effects" of the State's intradistrict violation. The district court also rejected petitioners' contention that the SSDs could be included in an interdistrict remedy as "agents" of the State (*id.* at 284a); the court concluded (*id.* at 290a) in light of the history and practice of local control over schools in Missouri that "the SSDs are more autonomous than those discussed in *Milliken* and numerous other desegregation cases."

b. Petitioners' principal quarrel (see 86-1717 Pet. 11, 27-28) appears to be with the district court's statement (Pet. App. 285a) that "[t]he linchpin of an interdistrict case, as declared by the Supreme Court, is whether there has been a racially discriminatory act by each district that substantially caused segregation in another district." Petitioners seek to contrast that statement with this Court's statement in *Milliken* v. *Bradley,* 418 U.S. at 744-745, that, as a necessary predicate for setting aside the boundaries of "separate and autonomous school districts * * * it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation" (see 86-1717 Pet. 34-35).

Petitoners' emphasis on the particular formulation of the issue by the district court is of little consequence at this stage in the litigation. As the case comes to this Court, the immediate subject of scrutiny is not the opinion of the district court, but the judgment of the court of appeals. And the plurality opinion of the court of appeals employed a legal standard that was faithfully drawn from *Milliken* v. *Bradley*. In describing the standard for interdistrict relief, the court of appeals perceived that " 'it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation' " (Pet. App. 33a (quoting *Milliken* v. *Bradley,* 418 U.S. at 745)). Having articulated that unexceptionable legal standard, the court of appeals proceeded to apply that standard to the unchallenged facts found by the district court. At the completion of that process, the court of appeals concluded that there was ample basis to hold that this case fits comfortably within the facts of *Milliken* v. *Bradley* and does not vary from the facts of *Milliken* v. *Bradley* in the ways that petitioners suggest. See Pet. App. 65a-66a, 74a, 91a-93a.

The court of appeals' decision denying interdistrict relief was based on the district court's finding "that none of the alleged discriminatory actions committed by the State or the federal defendants had caused any significant current interdistrict segregation" (Pet. App. 13a-14a) and on "specific findings that negate the existence of significant interdistrict current effects in the SSDs" (*id.* at 74a (footnote omitted); see *id.* at 371a-493a (district court's individualized findings concerning each SSD)). The court of appeals concluded that the district court's findings "pose an insuperable barrier to granting interdistrict relief" (*id.* at 74a) and that "even accepting the * * * arguments [of petitioners in No. 86-1717] that the district court misread *Milliken* by improperly limiting its inquiry solely to whether the SSDs were guilty of committing constitutional violations, * * * the factual findings of the district court effectively foreclose findings of interdistrict effect in the SSDs flowing from constitutional violations with respect to housing that may have occurred in KCMSD" (*id.* at 90a-91a (footnote omitted)). It is these findings, rather than any legal conclusion reached below, that "foreclose[] efforts to require the SSDs to be subject to the claim for interdistrict relief" (*id.* at 91a-92a).

By focusing on a statement excerpted from the district court's extensive discussion without also challenging the findings of fact, petitioners are at bottom raising a debating point that can have no effect on the disposition of this case. In short, petitioners' effort runs counter to the well-established proposition that "[t]his Court 'reviews judgments, not statements in opinions' " (*California* v. *Rooney,* No. 85-1835 (June 23, 1987) (per curiam), slip op. 3 (quoting *Black* v. *Cutter Laboratories,* 351 U.S. 292, 297 (1956)). Where, as in this case, the language petitioners target is not even in the opinion of the court of appeals, but in the opinion of the district court, the call for an exercise of this Court's certiorari jurisdiction is all the more attenuated.

4. This Court has instructed that federal courts are "required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.' " *Hills* v. *Gautreaux,* 425 U.S. 284, 293-294 (1976) (quoting *Milliken* v. *Bradley,* 418 U.S. at 744). Accord, *e.g., Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971). Mindful of the " 'fundamental limitations on the remedial powers of the federal courts,' " this Court has stated that "[t]hose powers could be exercised only on the basis of a violation of the law and could extend no farther than required by the nature and extent of that violation" (*General Building Contractors Ass'n* v. *Pennsylvania,* 458 U.S. 375, 399 (1982) (quoting *Hills* v. *Gautreaux,* 425 U.S. at 293)). See also *Milliken* v. *Bradley,* 433 U.S. 267, 282 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 264-271 (1977).

In contrast to these tenets, petitioners would ask this Court to address novel and complex issues of interdistrict remedies without due regard to the record. Under principles announced in 1974 in *Milliken* v. *Bradley,* the absence of any significant present segregative effects outside of the KCMSD precludes an interdistrict remedy in this case for the State's intradistrict constitutional violations. 418 U.S. at 744-745, 748; see *Hills* v. *Gautreaux,* 425 U.S. at 293-294. Further clarification of that point of law is unnecessary, as is any review of the court of appeals' application of the law to the unchallenged facts of this case. Since this case ultimately does not present a sound basis for considering questions of interdistrict remedies—the only questions petitioners would place before this Court—the infirmities in the petitions are best recognized at the present stage in the proceedings.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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